

Mr. BROWBACK. On behalf of the Republicans, I yield the remainder of our time.

The ACTING PRESIDENT pro tempore. The question is on the adoption of the resolution.

The concurrent resolution (S. Cons. Res. 26) was agreed to.

The preamble was agreed to.

MORNING BUSINESS

Mr. HARKIN. Madam President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak for up to 10 minutes each.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Texas is recognized.

NOMINATION OF JUDGE SOTOMAYOR

Mr. CORNYN. Madam President, I would like to turn to another important topic; that is, the pending confirmation of Judge Sotomayor to be Associate Justice of the U.S. Supreme Court. Like many Senators, I have had the opportunity to visit with Judge Sotomayor in my office and, of course, congratulated her on this great honor. I further pledged to her that she would receive a fair and dignified confirmation proceeding. Unfortunately, that has not always been the case in the Senate, but I did tell her that as far as I was concerned, I would do everything I could to make sure she was treated with respect.

Over the last few weeks, my colleagues on the Judiciary Committee and I have begun a thorough review of her record. Judge Sotomayor comes with one of the longest tenures of any judge nominated to the U.S. Supreme Court on the Federal bench—for about 17 years, so there is a rather lengthy record to review. In addition, she has given, as you might expect, many speeches and written law review articles and made other statements that deserve our attention. She has responded to the questionnaire sent by the Senate Judiciary Committee, and there are other followup questions which I anticipate she will be answering in the coming weeks.

So our review is ongoing in anticipation of a confirmation hearing beginning July 13 in the Senate Judiciary Committee.

But so far it is fair to say that there are a number of issues that have come up which I would like to talk about briefly that I anticipate she will have an opportunity to clarify or otherwise respond to and make her position clear for the American people and for the Senate as we perform our constitutional obligation under article II, section 2 of the Constitution.

Most of the focus, during a judicial confirmation hearing, is on the President's authority under the Constitu-

tion to nominate individuals to serve as judges. But, in fact, the very same provision of the Constitution, the very same section of the Constitution, section 2 of article II, also imposes an obligation on the Senate. In other words, we have a constitutional duty ourselves in the Senate to provide advice and consent and then to vote on the nomination once voted out of the committee.

The concerns I wish to raise at this point do not suggest that these are disqualifying, by any means, for Judge Sotomayor. I believe that, as I have indicated, she deserves the opportunity to explain her approach to these issues and particularly her judicial philosophy more clearly and to put the opinions and statements we have come across during our review in proper context.

I believe it is not appropriate for any of us to prejudge or to preconfirm Judge Sotomayor. Our job as Senators is to ask how she would approach the duties of an Associate Justice of the United States Supreme Court. And the areas, as I said, I would like to focus on are numbered three.

The first issue has to do with her approach to the second amendment. Of course, the second amendment to the U.S. Constitution, part of our Bill of Rights, incorporates the right to keep and bear arms.

The second amendment says:

A well regulated militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed.

The American people understand that the second amendment limits government and protects individual liberty. As Justice Joseph Story wrote nearly 200 years ago, the second amendment acts as a "strong moral check against the usurpation and arbitrary power of rulers."

As the U.S. Supreme Court itself held last year in the *District of Columbia v. Heller*: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."

I agree strongly with the Supreme Court's reasoning in the *Heller* decision, and I think most Americans accept that as the law of the land. Judge Sotomayor, on the other hand, as a member of the Second Circuit Court of Appeals, was one of the judges that first was given an opportunity to apply that Supreme Court precedent in *Heller* to the States.

She concluded in that decision that the right to keep and bear arms was not a fundamental right, and, therefore, was not enforceable against the States via the due process clause of the Fourteenth Amendment. Her decision in that case was troubling in light of the *Heller* decision, especially because her opinion included very little significant legal analysis.

I would expect and hope Judge Sotomayor would elaborate on her

thinking about this case, as well as the scope of the second amendment, during the course of the confirmation hearings. Americans need to know whether we can count on Judge Sotomayor to uphold all of the Bill of Rights, including the second amendment.

The next subject that I think will bear some discussion during the confirmation hearings is Judge Sotomayor's views of private property rights, another fundamental right protected by our Bill of Rights, that is simply stated in the fifth amendment of the U.S. Constitution, the right not to have property taken for public use without just compensation.

The fifth amendment provides an absolute guarantee of liberty against the power of eminent domain, by permitting government to seize private property only for public use.

Our colleagues will recall the controversial decision of the U.S. Supreme Court in 2005 in *Kelo v. City of New London*, a decision where the Supreme Court greatly broadened the definition of public use and, thereby doing, greatly limited the property rights protected by the Bill of Rights for more than two centuries.

The Court held that government can take property from one person and give it to another person if the government decided that by so doing it would promote economic development. The *Kelo* decision represents a vast expansion of government power of eminent domain. And that is why I introduced legislation that same year to limit that power and to restore the basic protections of our homes, small businesses, and other private property rights that the Founders intended in the fifth amendment to the Constitution.

I believe the *Kelo* decision went too far. Yet by her decision in the case of *Didden v. Village of Port Chester*, it appears Judge Sotomayor did not feel like it went far enough. Judge Sotomayor was part of a panel that upheld an even more egregious overreach by government when it came to private property rights.

In that case, two private property owners wanted to build a pharmacy on their land but in an area the government had essentially handed over to another private developer. The developer offered the owners a choice: Give me a piece of the action or we will proceed to condemn your property. The property owners, as you would think would be their right, refused. Yet the government, the local government, delivered on the developer's threat the very next day.

I believe this decision represents an outrageous abuse of the power of eminent domain for a nonpublic purpose and a tremendous extension of an already flawed decision in the *Kelo* case by the U.S. Supreme Court. So I think it is only fair and right that we ask Judge Sotomayor how she can square that decision in the *Didden* case with the plain meaning of the fifth amendment to the Constitution and, indeed, even the *Kelo* case itself.